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IN THE
COURT OF APPEALS OF INDIANA

CHARLES W. KOEHLER,

Appellant-Plaintiff,

vs.

WILLIAM H. CULPEPPER, JR.,

Appellee-Defendant.

No. 29A02-0611-CV-991

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0507-PL-652

May 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-third-party-plaintiff Charles W. Koehler appeals from the trial court's dismissal of his third-party complaint against appellee-third-party-defendant William H. Culpepper, Jr. Koehler raises a number of arguments, one of which we find dispositive—that Koehler's claims against Culpepper arise under the employment agreement between Koehler and his employer, SePRO Corporation (SePRO) such that Culpepper is required to submit to binding arbitration. Finding that Koehler's third-party claims do not fall under the scope of the employment agreement, we affirm the judgment of the trial court.

FACTS

On June 1, 1995, Koehler was employed by SePRO as Chief Financial Officer and Treasurer. Koehler was also a member of the corporation's Board of Directors. As of September 30, 2004, Koehler held approximately 5.74 percent of the corporation's stock. SePRO is a closely-held corporation and, at all times, Culpepper was the majority shareholder. As of September 30, 2004, Culpepper held approximately eighty percent of the corporation's stock. Culpepper was also the President, Chief Executive Officer, and a member of the Board of Directors of SePRO.

On November 6, 1997, Koehler and SePRO executed an Executive Employment Agreement and Stock Purchase and Shareholder Agreement (the Agreement), which provided that upon Koehler's retirement the corporation would redeem his shares based upon a methodology contained in the Agreement. Culpepper signed the Agreement on behalf of SePRO. The Agreement requires the arbitration of disputes arising thereunder: "[t]he parties hereto agree that any dispute arising under this Agreement, including a dispute as to [stock] value, shall be submitted for final and binding arbitration in accordance with the rules then obtaining of the Indiana Rules of Alternative Dispute Resolution." Appellant's App. p. 39.

On November 13, 2002, SePRO's Board met to consider the purchase of a licensing agreement from Eli Lilly & Co. that would grant SePRO a license to develop and commercialize a compound designed to treat and control human lice. Koehler contends that at this meeting, the Board agreed that the stock redemption methodology contained in the Agreement was inaccurate and unfair, especially if SePRO decided to invest in the Eli Lilly license. Koehler also argues that the Board orally agreed to amend the stock redemption methodology contained in the Agreement and that Culpepper promised that he would implement the amended valuation methodology.

In January 2003, Koehler notified SePRO that he planned to exercise his right to retire in 2004. He contends that he chose to do so based on Culpepper's alleged representation that the fiscal end of 2003 would bring the "high water mark" of SePRO stock for several years. Appellant's Br. p. 5-6. Thereafter, Koehler insists that the Board and shareholders agreed repeatedly to amend the stock redemption methodology in the Agreement during meetings that took place on March 3 and October 10, 2003.

On January 12, 2004, at Koehler's annual performance review, Culpepper presented to Koehler his methodology for valuing Koehler's SePRO shares in anticipation of Koehler's retirement later that year. According to Koehler, Culpepper's methodology did not correspond with the agreed-upon amended methodology discussed at various Board and shareholder meetings. Koehler objected to Culpepper's methodology, after which Culpepper allegedly promised that he would finalize the valuation methodology in further discussions to take place in the following sixty days. Koehler alleges that over the next six months, Culpepper refused to meet with him to finalize the methodology.

On September 9, 2004, Culpepper provided Koehler with the valuation methodology, which corresponded to that contained in the Agreement rather than the amended valuation methodology contained in the alleged subsequent oral agreements. On September 20, 2004, Koehler notified SePRO that he planned to delay his retirement in light of the valuation dispute. On September 27, 2004, Culpepper rejected the delay. The refusal to permit Koehler to retract his consent to retire triggered SePRO's obligation to redeem his shares. Koehler's last day of employment with SePRO was on October 31, 2004.

On July 18, 2005, SePRO filed a petition to compel arbitration between SePRO and Koehler regarding the valuation and redemption of his SePRO stock pursuant to the Agreement's binding arbitration clause. On August 18, 2005, Koehler filed, among other things, a third-party complaint against Culpepper, alleging breach of fiduciary duties, tortious interference with contract, oppression of a minority shareholder, negligent misrepresentation, and constructive fraud. Koehler's respective prayers for relief requested that the trial court order the dispute to binding arbitration pursuant to the Agreement. He did not make any alternative requests for separate judicial relief.

On October 21, 2005, Culpepper filed a motion to dismiss Koehler's third-party complaint pursuant to Indiana Trial Rule 12(B)(6), contending that the complaint did not state a claim on which relief could be granted because, among other things, Culpepper was not a party to the Agreement. Following a hearing on Culpepper's motion, the trial court dismissed Koehler's third-party complaint on July 24, 2006. Koehler now appeals.

DISCUSSION AND DECISION

I. Standard of Review

Koehler argues that the trial court erred in granting Culpepper's motion to dismiss the third-party complaint. We apply a de novo standard of review to a dismissal for the failure to state a claim and do not defer to the trial court's decision. The grant or denial of a motion to dismiss turns only on the legal sufficiency of the claim and does not require determinations of fact. A Rule 12(B)(6) motion to dismiss tests the legal sufficiency of a complaint; in other words, we must consider whether the allegations in the complaint establish any set of circumstances under which the plaintiff would be entitled to relief. A court should accept as true the facts alleged in the complaint, and should only consider the pleadings in the light most favorable to the plaintiff. We must also, however, draw every reasonable inference in favor of the nonmoving party. McCalment v. Eli Lilly & Co., 860 N.E.2d 884, 890 (Ind. Ct. App. 2007).

II. Arbitrability of Koehler's Claims

We will assume for argument's sake that Culpepper is bound to an Agreement to which he is not a party because he is in privity with SePRO. We consider, therefore, whether the claims that Koehler brought against Culpepper as an individual fall under the scope of the Agreement and its arbitration clauses. When interpreting a contract, the primary goal is to ascertain and effectuate the parties' intent. Samar, Inc. v. Hofferth, 726 N.E.2d 1286, 1290 (Ind. Ct. App. 2000). We determine the parties' intent from within the four corners of the document. Berkel & Co. Contractors, Inc. v. Palm & Assocs., 814 N.E.2d 649, 657 (Ind. Ct.

App. 2004). The interpretation of a contract is a question of law. Irvine v. Irvine, 685 N.E.2d 67, 70 (Ind. Ct. App. 1997).

Here, there are two relevant arbitration provisions in the Agreement. First, the Article governing stock purchase price states as follows:

> [s]hould any good faith dispute exist with regard to the establishment of [stock] value, such dispute, if not resolved, shall be submitted to binding arbitration in accordance with existing Indiana Rules of Alternative Dispute Resolution.

Appellant's App. p. 21-22. For the purposes of arbitrating stock value, the Agreement then requires that "the arbitrator shall be educated and experienced in business appraisals." Id. at 22.

As noted above, Koehler brought the following third-party claims against Culpepper: breach of fiduciary duties, tortious interference with contract, oppression of a minority shareholder, negligent misrepresentation, and constructive fraud. None of these claims concerns a dispute regarding the valuation of Koehler's SePRO's shares such that an arbitrator experienced in business appraisals would be needed to evaluate the claims; to the contrary, these claims all center on Culpepper's allegedly tortious behavior toward Koehler.[1] Thus, the Agreement's first arbitration provision does not apply to Koehler's third-party claims.

Koehler directs our attention to Polinsky v. Violi, 803 N.E.2d 684 (Ind. Ct. App. 2004), in which we held that a party may not avoid a general arbitration clause by bringing a

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[1] Obviously, Koehler's complaint regarding the way in which SePRO valued his shares arises under the Agreement and is subject to the binding arbitration clause. Indeed, this litigation was instituted by SePRO, which filed a petition to compel arbitration of the dispute.

tort claim as opposed to a claim for breach of contract. The arbitration clause in Polinsky, however, was a general one requiring the arbitration of "any controversy or claim between the parties hereto [that] arises out of this Agreement . . . ." Id. at 686. Here, the Agreement's first clause is far narrower than the one contemplated by the Polinsky court and explicitly requires arbitration only of good faith disputes regarding the establishment of stock value. Inasmuch as this clause explicitly applies only to valuation disputes, therefore, the Polinsky analysis does not apply and we find that this provision does not require claims sounding in tort to be arbitrated.

The Agreement also contains a more general, catch-all provision, which provides as follows:

> [t]he parties hereto agree that any dispute arising under this Agreement, including a dispute as to value, shall be submitted for final and binding arbitration in accordance with the rules then obtaining of the Indiana Rules of Alternative Dispute Resolution.

Appellant's App. p. 39 (emphasis added). This provision refers to disputes regarding topics such as resignation, termination, incapacity, disability, retirement, non-disclosures of information, non-competition, and non-solicitation of customers or employees.

For this arbitration provision to apply, Koehler's claims against Culpepper must arise under the Agreement. We will consider the basis for each of the claims:

- Breach of fiduciary duties: based on Culpepper's alleged conduct that prevented SePRO from redeeming Koehler's shares "pursuant to the amended methodology" contained in the alleged oral agreement(s) reached by SePRO's Board and shareholders. Id. at 84.

- Tortious interference with contract: based on Culpepper's alleged conduct, as majority shareholder, that "induced SePRO to breach the oral contract by and between Koehler and SePRO." Id. at 86.

- Oppression of minority shareholder: based on Culpepper's alleged conduct that prevented SePRO from redeeming Koehler's shares "pursuant to the amended methodology" contained in the alleged oral agreement(s) reached by SePRO's Board and shareholders. Id. at 88. Alternatively, based on Culpepper's silent intention to disregard the oral agreement(s) regarding the amended valuation methodology, which induced Koehler to retire prematurely. Id.

- Negligent misrepresentation: based on Culpepper's refusal to redeem Koehler's shares pursuant to the valuation methodology contained in the oral agreement(s). Id. at 91. Alternatively, based on Culpepper's silent intention to disregard the oral agreement(s) regarding the amended valuation methodology, which induced Koehler to retire prematurely. Id.

- Constructive fraud: based on Culpepper's refusal to redeem Koehler's shares pursuant to the valuation methodology contained in the alleged oral agreement(s). Id. at 95. Alternatively, based on Culpepper's silent intention to disregard the oral agreement(s) regarding the amended valuation methodology, which induced Koehler to retire prematurely. Id.

It is apparent that these claims do not arise under the original Agreement. To the contrary, they plainly stem from Culpepper's behavior with respect to the share valuation methodology contained in the alleged oral agreement(s). Koehler has not alleged that the oral agreement(s) contained a binding arbitration provision. Consequently, even if Culpepper is bound to the Agreement, Koehler's third-party claims do not arise thereunder and the trial court properly dismissed the third-party complaint seeking arbitration.

Finally, Koehler argues that his "nonarbitrable" third-party claims should be allowed to proceed in the trial court as a judicial proceeding rather than being dismissed altogether. Culpepper concedes that his motion to dismiss addressed only the arbitrability of Koehler's third-party claims, but correctly observes that arbitration was the only relief requested by the third-party complaint. Koehler did not seek judicial relief as an alternative or additional remedy. Thus, upon determining that Koehler's third-party claims are not arbitrable, the trial court correctly concluded that nothing in the third-party complaint survived. As noted by

Culpepper, Koehler had the option to amend his pleading within ten days of the dismissal pursuant to Indiana Trial Rule 12(B). Koehler, however, chose not to amend the third-party complaint. Consequently, the trial court properly dismissed the complaint for failure to state a claim upon which relief may be granted.

The judgment of the trial court is affirmed.

CRONE, J., concurs.

FRIEDLANDER, dissents with opinion.

IN THE
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CHARLES W. KOEHLER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 29A02-0611-CV-991
	)	
WILLIAM H. CUPLEPPER, JR.,	)	
	)	
Appellee-Defendant.	)	

FRIEDLANDER, Judge, **dissenting**

I believe Koehler's claims arise under the written Agreement and therefore should be submitted to arbitration per that agreement. I respectfully dissent from the Majority's ruling to the contrary.

The Majority concludes that the claims Koehler brought against Culpepper do not fall within the scope of the Agreement. In reaching this conclusion, the Majority lists Koehler's theories of recovery and accurately labels and identifies the source from which Koehler's claims under that theory arise. In each instance, the Majority determines that such claims are rooted in the alleged oral modification of the Agreement. Concluding that any claim arising under the alleged oral modification necessarily does not arise under the original written

Agreement, the Majority holds that the contractual duty to arbitrate does not apply to those disputes. I disagree.

It goes without saying that parties may change, modify, vary, or qualify terms of an agreement between them. Koehler claims the parties did that here. The alleged oral modification in this case changed the method of valuation of Koehler's shares of stock. It did not, however, purport to supplant the written contract in its entirety in all other respects. In fact, although there are several contested issues in this case, neither party contends the alleged oral modification did or should replace the written agreement in toto. *See, cf.*, *Columbia Club, Inc. v. Am. Fletcher Realty Corp.*, 720 N.E.2d 411, 423 (Ind. Ct. App. 1999) ("[w]here a subsequent agreement lacks any language, either express or implied, which indicates an intention to create a novation, relieve contractual liabilities, substitute parties, or extinguish the old contract, we will not conclude that a party to the first contract has waived its right to sue for breach in the first contract"), *trans. denied*. Rather, Culpepper infers, at most, that the oral modification stands apart from the written Agreement and is to be considered as separate and distinct therefrom. Assuming, as we must, that there was an oral agreement to alter the method of valuation in the manner that Koehler claims, the modification supplants only the corresponding and conflicting term in the written Agreement. In all other respects, including the provisions calling for binding arbitration, the written Agreement remains in force.

Proceeding with the analysis on the foregoing principles, this dispute centers upon the manner in which Koehler's stock will be valued. In fact, although Koehler asserts several theories of recovery, at the end of the day, this entire controversy finds its origin in the methodology to be employed in valuing Koehler's stock. Koehler claims the applicable methodology is that upon which the parties orally agreed in the 2002 and 2003 meetings, where the topic was discussed in conjunction with SePRO's proposed purchase of a licensing agreement with Eli Lilly & Co. SePRO, through Culpepper, refuses to utilize the methodology that Koehler claimed they had agreed upon. As I see it, there could hardly be a clearer example of a "good faith dispute … with regard to the establishment of [stock] value," which the written Agreement mandates must be submitted to binding arbitration. *Slip op.* at 6.

Finally, the majority agrees with Culpepper's contention that Koehler's claims are against a third party – Culpepper – and as such do not fall under the purview of the Agreement. In *Polinsky v. Violi*, 803 N.E.2d 684 (Ind. Ct. App. 2004), we held that a closely-held corporation's duty to arbitrate extended to its majority shareholder because that shareholder was in privity with the corporation. We explained:

> Parties to a contract or those in privity with the parties have rights under the contract. This principle applies to contracts requiring arbitration of claims. The concept of privity is most frequently applied in the equitable estoppel context, but it is also applied in contract cases, where privity has been described as a "mutual or successive relationship as to the same right of property, or an identification of interest of one person with another as to represent the same legal right." *Mislenkov v. Accurate Metal Detinning, Inc.*, 743 N.E.2d 286, 289 (Ind. Ct. App. 2001). Furthermore, according to comments to the Restatement (Second) of Judgments § 59(3), "[f]or the purposes of providing a day in court on issues contested in litigation, however, there is no good reason why a closely held corporation and its owners should be ordinarily regarded as legally distinct."

Id. at 688.

The record reveals in the instant case that SePRO is a closely held corporation and Culpepper owns approximately 80% of its outstanding stock. Culpepper signed the Agreement in controversy two separate times, once in his capacity as SePRO's secretary, and once in his capacity as SePRO's president. The record reveals that Culpepper is and has been the primary decision-maker for SePRO. Clearly, Culpepper and SePRO have a commonality of interests in denying Koehler's allegations concerning the agreement to modify the stock valuation methodology. These facts demonstrate to me that Culpepper has an identification of interest with SePRO such that he stands in privity with SePRO. *Polinsky v. Violi*, 803 N.E.2d 684. Therefore, Culpepper is bound by the Agreement's arbitration clause.

In summary, Indiana recognizes a strong policy in favor of enforcing arbitration clauses. *Homes by Pate, Inc. v. DeHaan,* 713 N.E.2d 303 (Ind. Ct. App. 1999). Koehler carried his threshold burden of demonstrating the existence of an enforceable agreement to arbitrate the dispute. He also proved that the matter in dispute here is the type of claim the parties agreed to arbitrate. Because Koehler has established those elements, we are required by statute to compel arbitration. *See* Ind. Code Ann. § 34-57-2-3(a) (West, PREMISE through 2006 Second Regular Session). I would reverse the trial court and do just that.